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# In the Supreme Court of the United States

OCTOBER TERM, 1967

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No. 818

TRANSCONTINENTAL BUS SYSTEM, INC., ET AL.,
PETITIONERS

*v.*

CIVIL AERONAUTICS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 383 F. 2d 466. The findings and order of the Civil Aeronautics Board (Pet. App. 45a) are not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on July 24, 1967. On October 13, 1967, the time for filing a petition for writ of certiorari was extended to November 14, 1967, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

## QUESTION PRESENTED

Whether the Civil Aeronautics Board abused its discretion in dismissing without a hearing complaints against air carrier tariffs providing for reduced military standby fares after it found that the fares were justified by competitive considerations and the needs of the national defense.

## STATUTE INVOLVED

The relevant provisions of the Federal Aviation Act (72 Stat. 731, 49 U.S.C. 1301, *et seq.*) are set forth in Appendix to the petition.

## STATEMENT

In 1963 the Civil Aeronautics Board approved, on an experimental basis, "military standby tariffs" filed by twenty scheduled air carriers. Under the tariffs, military personnel on leave, pass, or furlough, or within seven days of discharge, will be carried at half jet coach or single class fare if empty seats remain after all regular fare passengers are aboard, but they may be "bumped" en route to accommodate a regular fare passenger. When the air carriers filed extensions of these tariffs in 1965, petitioners, a national trade association of motor bus operators and affiliated bus companies, filed complaints seeking suspension and investigation of the tariffs. Answers requesting that the complaints be dismissed were filed by 16 air carriers and the Department of Defense. On the basis of the pleadings, the Board found that the complaints did not state facts which warranted an

investigation and dismissed the complaints without a hearing.[1]

The principal issue raised by petitioners' complaints was whether the offering of reduced standby fares to military personnel and not to civilian passengers constituted unjust discrimination prohibited by Section 404(b) of the Federal Aviation Act.[2] Petitioners argued that the tariffs were unlawful *per se* because they discriminated in favor of a category of persons not specifically listed in Section 403(b), which permits carriers to offer free or reduced-rate transportation to certain named categories of persons (mostly persons having some connection with the carrier). The Board rejected petitioners' argument, stating that "[w]hether a particular discrimination is unjust is a question to be determined after consideration of all relevant matters and a particular discrimination based upon identity may be justified by compelling circumstances" even though the favored traffic is not among the categories listed in Section 403(b) (Pet. App. 50a).

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[1] Section 1002(a) of the Federal Aviation Act (49 U.S.C. 1482(a)) provides in pertinent part: "Whenever the Administrator or the Board is of the opinion that any complaint does not state facts which warrant an investigation or action, such complaint may be dismissed without hearing."

[2] Section 404(b) (49 U.S.C. 1374(b)) provides:

> No air carrier or foreign air carrier shall make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, locality, or description of traffic in air transportation in any respect whatsoever or subject any particular person, port, locality, or description of traffic in air transportation to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

The Board held that any discrimination inherent in the military standby fares was justified by considerations relating to the national defense and the competitive position of the air carriers (Pet. App. 50a). The Board relied upon the assertion of the Secretary of the Army that the standby fares contribute significantly to the national defense by improving the morale of servicemen, who are able to visit their families more frequently and at greater length than would be possible using surface transportation, and by reducing the safety hazards of hitchhiking and long-distance driving (Pet. App. 47a–48a). Noting that both the railroads and the bus lines offer reduced fares to military personnel on furlough, the Board found that the air carriers would be at a "gross competitive disadvantage vis-a-vis the surface common carriers" in the transportation of military personnel if they were prohibited from offering the standby fares. "[E]ven with the military standby fares," the Board pointed out, "air fares are at a higher level than the surface furlough fares, and the surface fares are not restricted by standby or space-available provisions" (Pet. App. 51a).

The Board also rejected petitioners' argument that the half-fare standby tariffs were not "just and reasonable" fares required by Section 404(a). The Board found that the tariffs met the "profit-impact" test of reasonableness, customarily applied to standby services, in that the revenues covered the carriers' out-of-pocket costs (Pet. App. 52a–56a).

On petition for review, the court of appeals held that the Board had not abused its discretion in dis-

missing the complaints without a hearing. The court agreed with the Board's conclusion that the Act does not prohibit reduced rates for classes of persons not enumerated in Section 403(b), provided those rates are not unjustly discriminatory (Pet. App. 18a–24a). The court held that the Board must consider the public interest factors set out in the statute's declaration of policy (Section 102) and rule of ratemaking (Section 1002(e)) and that under these provisions "[b]oth competition and adapting the air transportation industry to the needs of national defense are considerations which may validly be weighed by the Board in determining whether a tariff is unjustly discriminatory" (Pet. App. 30a–31a, 36a).

## ARGUMENT

Petitioners' contentions, taken as a whole, raise two basic questions: whether allowing reduced fares for a category of persons not listed in Section 403(b) is unjustly discriminatory *per se*, and whether the Board was precluded from considering the interests of competition and the national defense in determining whether the military standby tariffs were unjustly discriminatory. The court below correctly answered both these questions in the negative, and its decision is not in conflict with any other judicial or administrative decisions. There is no occasion for further review by this Court.[3]

[3] The court below reversed and remanded the Board's dismissal of complaints challenging reduced fare tariffs for students and young adults. We have not petitioned for certiorari to review that ruling.

1. The court below held that Section 403(b) "merely permits the granting of reduced-rate transportation to the classes of persons in the section without regard to whether such rates meet the requirements of § 404(b), and does not preclude the giving of discriminatory rates in a proper case to other classes of persons" (Pet. App. 24a). See *Flying Tiger Line* v. *Civil Aeronautics Board*, 350 F. 2d 462, 465–466 (C.A.D.C.). This view is in accord with this Court's construction of Section 22 of the Interstate Commerce Act (49 U.S.C. 22) which, like Section 403(b), permits the granting of reduced rate transportation to enumerated categories of persons:

> The unlawfulness defined by sections 2 and 3 consists either in an "unjust discrimination" or an "undue or unreasonable preference or advantage," and the object of section 22 was to settle beyond all doubt that the discrimination in favor of certain persons therein named should not be deemed unjust. It does not follow, however, that there may not be other classes of persons in whose favor a discrimination may be made without such discrimination being unjust.[4]

Petitioners emphasize the fact that in 1960 Congress considered, but failed to pass, legislation which

[4] *Interstate Commerce Commission* v. *Baltimore & Ohio R. Co.*, 145 U.S. 263, 278. See also, *Nashville, C. & St. L. Ry.* v. *Tennessee*, 262 U.S. 318, 323. Although it was not until 1944 that Section 22 of the Interstate Commerce Act was amended to include military furlough traffic, the Commission had approved reduced rates for such traffic for several years prior thereto. As the court below pointed out, the amendment was designed simply "to insure the continuance of such transportation by precluding any determination that the reduced rates" were unjustly discriminatory (Pet. App. 23a).

would have amended Section 403(b) to include military personnel among those to whom carriers could grant reduced-rate transportation (Pet. 23–24, 29–30). In view of the Board's consistent rulings that Section 403(b) is not an exclusive list of persons to whom reduced rate transportation may be offered, the failure of Congress to include military personnel in Section 403(b) merely reflects a decision that discrimination in favor of this class of traffic should continue to be subject to the Board's substantive review under Section 404(b).[5] No inference that an agency lacks the authority requested from Congress can be drawn from the fact that it sought an amendment which would terminate or avoid adverse contentions and litigation.

[5] As the court below pointed out (Pet. App. 21a–22a), the Board has consistently held that Section 403(b) is not an exclusive list of persons to whom reduced rate transportation can be afforded (*e.g.*, *Airline Pass Agreement* 1 C.A.A. 677; *ATC Resolutions Re Travel Agents and Tour Conductors*, 31 C.A.B. 991). Petitioners cite Orders E–14349 (29 C.A.B. 1344) (Pet. 22) and E–25757 (Pet. 23) as Board pronouncements that reduced rates may not be granted to classes of traffic other than those listed in Section 403(b). As the court below (Pet. App. 22a) noted, however, Order E–14349 was a preliminary order, and the intimation that Section 403(b) is exclusive was repudiated by subsequent orders in the same proceeding, *ATC Resolutions Re Travel Agents and Tour Conductors*, 30 C.A.B. 1552; 31 C.A.B. 991. In Order E–25757, the Board's statement relied upon by petitioners, that "Section 403(b) * * * specifically authorizes the Board, *by regulation*, to permit free or reduced rate transportation to others than those enumerated in the Act with respect to overseas or foreign air transportation, but does not grant similar authority to interstate air transportation" (emphasis added), in no way detracts from its consistent decisions that other classes of traffic may be granted free or reduced rate transportation provided the discrimination is not unjust under Section 404(b).

*United States* v. *Capital Transit Co.*, 325 U.S. 357, 362.

Petitioners argue that the Board's consideration of these factors is inconsistent with this Court's decision in *Delta Air Lines* v. *Summerfield*, 347 U.S. 74. In that case, however, the Court held that the meaning of the statutory provision in question was so clear that the policies set out in Section 102 could not be utilized to produce a different meaning. In the present case, the meaning of "unjust discrimination" cannot properly be determined without reference to the basic policies of the Act. The court below held that the rule of equality was paramount but that the discriminatory fares were justified by considerations which Congress and this Court have deemed relevant to the Board's determination. The weight to be given to the various factors depends upon the particular facts of each case and is a matter for the agency's determination. *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344. As set forth in the statement, *supra*, there was ample support for the Board's assessment of the importance of the national defense and competitive factors.[8]

[8] Petitioners suggest that "[u]nder the competitive theory espoused by the Board, no potentially profitable fare discount, irrespective of its discriminatory characteristics, would be barred", and they purport to see the day when "the airlines can, with the Board's encouragement, selectively divert those markets comprising the principal sources of Petitioners' passenger revenues" (Pet. pp. 17–18). The competitive factor was only one of the factors entering into the Board's determination and it by no means follows that, in other factual contexts, it would lead the Board to the same result. In *American Trucking Assns.* v. *F.C.C.*, *supra*, the Commission determined that there was insufficient competitive necessity to justify certain discrim-

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1968.

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inatory rates, and at the same time ruled that other similar discriminatory rates were justified on this basis. The court approved, noting that this Court had held in *Eastern-Central* that the factors which should predominate under the particular circumstances was a choice for the Commission to make.

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